1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in ninety-one days while serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the 2004 presidential election, which shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and raised a combined total of $496.6 million in contributions from individuals. *Report of Receipts and Disbursements: Bush-Cheney '04 Inc.*, filed 9/20/04, *available at* http://www.fec.gov; *Report of Receipts and Disbursements: John Kerry for President Inc.*, filed 9/20/04, *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As a Result of Spiraling Campaign Costs, Elected Officials Spend An Excessive and Ever-Increasing Proportion of Their Time Raising Funds for the Purposes of Re-election and Election to Higher Office.

As a result of spiraling campaign costs, elected officials spend an excessive and ever-increasing proportion of their time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress

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[4] *See, e.g.*, 147 Cong. Rec. S 2603 (daily ed. Mar. 21, 2001) (statement of Senator Richard Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch an effective campaign."); 133 Cong. Rec. S 7782 (daily ed. Sept. 21, 1997) (statement

(Continued on following page)

spend many hours each week – and sometimes each day – raising money, "dialing for dollars,"[5] and attending fund-raisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized . . . When I was running, I was spending about two hours a day on the phone raising money. Minimum. Six days a week. That takes away from your ability to represent your constituents, or to do your legislative work, or what have you." Martin Schram, SPEAKING FREELY 38. Elected officials also travel frequently in order to raise money, not only within their own states, but also to other states with high concentrations of wealthy donors.[7]

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of Senator Harry Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A1 (quoting Senator Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," Statement of House Minority Leader Robert Michel; and "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," Statement of Representative Dave Durenberger).

[7] For example, in 1986 then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los

(Continued on following page)

Moreover, in order to meet the inordinate demands of a successful fundraising campaign, elected officials begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. "As soon as a Senator is elected here," said Senator Tom Harkin, "that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S 1053 (daily ed. Feb. 22, 1988). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan. 6, 1987).[8] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman). In sum, the current system relentlessly pressures office holders to spend a vast amount of their time fundraising.

Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 Nat'l J. 1448, 1448 (1990); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1998) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states.); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer," Statement of Representative Wyche Fowler).

[8] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for re-Election*, The Oregonian, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election).

C. The Time Spent Fundraising Diminishes the Quality of the Representation that Elected Officials Provide, and Undermines the Integrity of the Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." *See* James R. Carroll, *Senate Rejects Limits on Donations*, The Courier-Journal, March 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators no longer spend enough time on legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with fellow representatives. Rather, many legislators neglect these duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[9] Legislators often feel that they do not have the time to meet with or directly represent their constituents. As Representative

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[9] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, Los Angeles Times, July 24, 2000, at A3 (detailing Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amount of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

Christopher Shays lamented: "[Elected officials] spend far too much time fund-raising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H 339 (daily ed. Feb. 13, 2002). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[10] Representative Vin Weber stated that:

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[10] *See, e.g.*, 145 Cong. Rec. H 8225, H 8236 (daily ed. Sept. 15, 1999) (statement of Representative Thomas Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H 6937, H 6943 (daily ed. Aug. 3, 1998) (statement of Representative Marge Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing. Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S 5858 (May 15, 1991) (statement of Senator David Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

"when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending to their sworn duties and raising money for the purposes of re-election or election to a higher office.[11] One Congressman stated that the time spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[12]

Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office. The vast majority of a candidate's time is spent fundraising, as opposed to

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[11] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, Center for Responsive Politics, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1998); *see also* Larry Makinson, SPEAKING FREELY 39 (2d ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Representative Tom Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," Statement of Representative Leslie Byrne; and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," Statement of Senator Howard Metzenbaum).

[12] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had "been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

engaging with constituents, opponents or even ideas.[13] Because they are consumed with fundraising, candidates do not have time during their campaigns to engage the issues or the voters.[14]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed "institutional concern about the integrity of the U.S. Senate." Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM, at 4, 51 (1992). Former Senator Dennis De Concini said: "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and

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[13] *See* Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, Philadelphia Daily News, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face.").

[14] *See, e.g.*, 133 Cong. Rec. S 7782 (Statement of Senator Fritz Hollings ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Representative Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, Rocky Mountain News, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

raise money for my next election. And that always has bothered me from the standpoint of what I think the people elected me to do." Schram, SPEAKING FREELY 40.[15]

The current presidential election cycle provides a compelling example of the negative effects of unlimited spending. The two major party nominees, both current officeholders, decided to forego the public financing available in the primaries.[16] Instead, President Bush and Senator Kerry raised money at a pace of at least one million dollars per day, every day, while also serving as federal officeholders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that their time, and that of all elected officials, is a compelling interest worth protecting.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO *BUCKLEY V. VALEO*.

A. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital to Our System of Representative Democracy.

As discussed above, fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure

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[15] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[16] President Bush raised massive sums even though he had no primary opponent.

limits thus serve the vital interest of protecting our system from the demands that fundraising places on the time of our elected officials.

The American Republic is founded on the notion of elected representatives serving the people. As James Madison wrote in Federalist 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art. I; U.S. CONST. Amend. XVII; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[17] This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Moreover, the Constitution also directly protects the core functions of legislators. Thus, the Constitution's

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[17] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S. CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

Speech or Debate Clause protects the right of legislators to be free from interference with their core functions: debating, voting, and actions taken in pursuit of these lawful functions. U.S. CONST. art. I, § 6, cl. 1; *see also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation,"); *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (holding in a First Amendment case that the right of constituents to be "represented in governmental debates by the person they had elected to represent them" is an interest of the highest magnitude).

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. These hours represent time that could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vince Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994). When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

In sum, the time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Because elected representatives are at the heart of the American republic, the government has a compelling interest in protecting their time in service of the people.

B. Protecting the Integrity of Our System of Representative Democracy is a Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to *Buckley v. Valeo*.

In *Buckley* this Court held that laws that restrict campaign contributions or expenditures must meet exacting scrutiny.[18] The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived strict scrutiny on the grounds that: "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Commission*, 540 U.S. 93, ___, 124 S.Ct. 619, 660-61 (2003) (extending this rationale to justify limits on soft money contributions). This is precisely the interest served by protecting the time of legislators in the service of their

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[18] *Amici* suggest that the Court may also consider whether strict scrutiny is required when reviewing campaign finance reform measures, or whether a lesser level of scrutiny would suffice. Irrespective of the level of scrutiny, *amici* submit that there is at least a compelling government interest.

core legislative functions. Just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Similarly, the Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brow*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). As set forth above, the inordinate demands of fundraising have undermined the quality of campaigns and the electoral process in the same manner that they have undermined the quality of representation. Fundraising takes the place of debating the issues and meeting with constituents.

Buckley and the Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of representative democracy. Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley*

spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[19] Similarly, Justice Breyer, in an opinion joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws, so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

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[19] As petitioners have suggested, there is significant disagreement in the lower courts on this matter that the Supreme Court can resolve. Several appeals courts and judges have opined that time protection is a compelling government interest. In the instant matter, the Second Circuit observed that, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit has affirmed the time protection rationale as being a compelling government interest. A concurrence in the Sixth Circuit offers a similar perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). In a recent case from the Tenth Circuit, Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans v. City of Albuquerque and Rue v. City of Albuquerque*, 366 F.3d 900, 911 (10th Cir. 2004), *cert. denied*, 125 U.S. 625 (2004). But majorities in these two cases from the Sixth and Tenth Circuits ultimately disagree with the Second Circuit opinion in the instant matter. The Court should grant this petition in order to provide clear guidance and resolve this split among the circuits.

C. Vermont's Campaign Limits Directly Serve This Compelling Interest.

The record in the case demonstrates that Vermont's campaign expenditure limits serve the compelling government interest of protecting the integrity of our system of representative democracy.

In enacting the law in question, the Vermont General Assembly specifically found that the demands of fundraising take excessive time away from the people's business. 1997 Vt. Laws P.A. 64 (H.28) (finding No. 1). After a full trial, the District Court in this case agreed, finding that "the need to solicit money from large donors at times turns legislators away from their official duties." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). This was confirmed by the Second Circuit: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Landell v. Sorrell*, 382 F.3d 91, 121-22 (2d Cir. 2004).

The State of Vermont has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.[20]

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[20] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

(Continued on following page)

These limits are similar to the myriad efforts that other States and localities have taxen to enact meaningful campaign reform, efforts that *amici* have long admired.[21] To the extent that the States are laboratories of democracy,[22] *amici* submit that this Court should clarify that experimentation like that undertaken by the State of Vermont is not per se banned by *Buckley*.

The limits adopted by the State of Vermont are supported by a compelling government interest. As in Vermont, without spending limits elected officials at all levels spend excessive amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating, and meeting with constituents – and the quality of campaigns. Protecting the integrity of elected office and of our system of representative democracy, both in the performance of elected officials and in the conduct of campaigns, is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of

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Ronald Michaelson, "Trends in Campaign Financing," *The Book of States*, Vol. 35, p. 275 (2003).

[21] *See, e.g.*, 142 Cong. Rec. S 377 (daily ed. Jan. 25, 1996) (Statement of Senator Bill Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[22] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should grant this petition for certiorari in order to resolve this important federal question, in light of conflicting lower court decisions, and to permit cities and states to continue to enact such reform in the service of our core democratic principles.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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In The

Supreme Court Of The United States

NEIL RANDALL, et al.
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

VERMONT REPUBLICAN STATE COMMITTEE
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, CALIFORNIA, HAWAII, IOWA, KENTUCKY, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF THE AMICI CURIAE

The amici curiae State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Conditional Cross Petitioners and urge this Court to resolve a clear split among the Circuits as to whether, and under what circumstances, campaign expenditure limits can pass constitutional muster.

Uncertainty surrounding the constitutionality of campaign expenditure limits has arisen as a result of the conflict between the Second Circuit's ruling in the present case, which concluded that *Buckley v. Valeo*, 424 U.S. 1 (1976), did not impose a *per se* ban on campaign expenditure limits, and the Tenth Circuit's ruling in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), which reached precisely the opposite conclusion.

The Amici States have a vital interest in this case because the uncertainty in the law resulting from the conflict between the Circuits, if left unresolved, will force States and municipalities across the country to waste valuable time and resources debating and repeatedly litigating this important constitutional issue, thereby imposing significant costs on state taxpayers, diverting legislative focus from other important matters, and burdening local judicial systems, all of which could be avoided by a ruling from this Court.

Accordingly, the Amici States respectfully urge this Court to grant certiorari to clarify the vitally important constitutional question whether, and under what circumstances, campaign expenditure limitations can pass constitutional muster.

REASON FOR GRANTING THE WRIT

THE UNCERTAINTY SURROUNDING THE CONSTITUTIONALITY OF CAMPAIGN EXPENDITURE LIMITATIONS, IF NOT RESOLVED, WILL FORCE STATES TO WASTE VALUABLE RESOURCES DEBATING AND REPEATEDLY LITIGATING AN IMPORTANT CONSTITUTIONAL ISSUE THAT COULD, AND SHOULD, BE RESOLVED BY THIS COURT.

A. The Second Circuit's Ruling In The Present Case And The Tenth Circuit's Ruling In *Homans* Are In Direct Conflict.

A critical issue in the present case is the constitutionality of the expenditure limitations that are a vital component of Vermont's campaign finance reform law, Vt. Stat. Ann. tit. 17, §§ 2801 - 2883. The petitioners argued in the Second Circuit that expenditure limitations were *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976), and could never be justified. The Second Circuit, however, disagreed, pointing out that "[t]he *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress' purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits." *Landell v. Sorrell*, 382 F.3d 91, 107 (2d Cir. 2004). According to the Second Circuit, *Buckley* "did not conclude that the Constitution would *always* prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations." *Id.* at 107 (emphasis added). Instead, "[i]t simply held that based on the record before it, '[n]o governmental interest that has been suggested is sufficient to justify' the federal expenditure limits." *Id.* at 107, quoting *Buckley*, 424 U.S. at 55. Accordingly, the Second Circuit concluded that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently

strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Id.* at 108. Examining the record before it, the Second Circuit concluded that two interests cited by Vermont in support of its expenditure limitations – the interest in avoiding the appearance and reality of corruption and the interest in protecting the time of officeholders from the burdens of fundraising -- were, taken together, sufficiently compelling to pass constitutional muster.

Last year, the Tenth Circuit considered the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), but reached precisely the opposite conclusion. As in the present case, the plaintiffs in *Homans* argued that expenditure limitations were *per se* barred by *Buckley*. Unlike the Second Circuit, however, the Tenth Circuit agreed with the plaintiffs, concluding that "under *Buckley* such restrictions cannot be supported as a matter of law." *Id.* at 914, citing *Kruse v. City of Cincinnati*, 142 F.3d 907, 915-916 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). In the Tenth Circuit's view, all three of the interests advanced by Albuquerque in support of its expenditure limits – the interest in avoiding the appearance and reality of corruption, the interest in protecting the time of officeholders from the burdens of fundraising, and the interest in encouraging a robust debate of the issues through electoral competition – were "constitutionally incapable of justifying spending restrictions as a matter of law." *Id.* at 914-915.[1] Thus, the Tenth Circuit and the Second Circuit have reached diametrically opposed conclusions regarding the constitutionality of expenditure limitations under *Buckley*.

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[1] Although the *Homans'* majority opinion elsewhere stated: "I agree that the *Buckley* Court did not adopt a *per se* rule against spending limits, " *Homans*, 366 F.3d at 915, the majority's analysis of the issues clearly demonstrates that it rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment.

B. State And Municipal Legislatures, Encouraged And Emboldened By The Second Circuit's Ruling, Have Begun To Adopt Reform Measures That Include Expenditure Limitations.

Encouraged that the Second Circuit's ruling has opened the door to reform measures that include campaign expenditure limitations, State and municipal legislators, who would not previously have considered such reforms, have recently begun to introduce in their respective jurisdictions, or to consider introducing, campaign finance reform bills that include mandatory expenditure limitations.

In Massachusetts, for example, a bill currently under consideration incorporates mandatory spending limits modeled on those in Vermont's Act 64. H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm). Specifically, the bill calls for limits on campaign expenditures for all general, special, and primary elections for state office, ranging from no more than $54,000 for candidates for the office of state representative, to no more than $3 million for candidates for the office of governor.

In North Carolina, legislators have introduced a bill that would impose mandatory expenditure limits on campaigns for the council of state and general assembly. H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005)(available at http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1533v0.html). Rather than specify dollar amounts, the Act would limit campaign expenditures to no more than 75% of the median amount spent by candidates in the last two comparable elections for the same office. *Id.* at § 2.

And in Oregon, proposed legislation seeks to limit campaign expenditures by restricting a candidate's expenditure of his or her own funds in an election campaign. H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess.

(Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro.html). Specifically, a candidate for statewide office would be prohibited from expending more than $50,000, and a candidate for any other public office would be limited to spending no more than $10,000, of his or her own funds. *Id.* at § 9.

Legislators in other States and certain municipalities are actively considering similar legislation, but have not yet introduced it. *See, e.g.*, Letter from Wisconsin Rep. Joseph Parisi to Jay Hecht, Wisconsin Common Cause, dated June 7, 2005 (Respondent-Intervenors Appendix 1).

C. If This Court Fails To Grant Certiorari, The Uncertainty In The Law Governing The Constitutionality Of Expenditure Limitations Will Force States To Waste Valuable Time And Resources Litigating The Issue Unnecessarily.

If this Court denies certiorari in the present case, and thereby fails to seize the opportunity to clarify the uncertainty in the law governing the constitutionality of campaign expenditure limitations, the case will be remanded to the District Court for an indefinite period of time during which State and local governments, faced with the split between the Circuits, will be forced to waste valuable time and resources debating and relitigating this important constitutional issue.

As noted above, legislators are looking at expenditure limitations with renewed interest following the Second Circuit's ruling in this case and are proposing legislation that incorporates such limits. To the extent that such measures are passed, the prevailing uncertainty surrounding their constitutionality will embroil States in legal challenges and appeals at considerable expense to the public fisc. Even if such measures are not passed, the time spent drafting, researching, introducing, and debating them

is valuable time that legislators could spend on other matters if they knew, for certain, whether expenditure limitations were constitutional. Without knowing, however, the legislative debates will continue and valuable state resources will be unnecessarily exhausted.

Even those States with no interest in adopting expenditure limitations stand to lose resources unnecessarily in the absence of clarification by this Court. Such a situation will result when a municipality within a State, or multiple municipalities, enact expenditure limitations for local candidates and thereby spur litigation that burdens the State's court system and administrative agencies. In *Homans*, for example, the City of Albuquerque's expenditure limitations resulted in both state and federal court challenges. *See Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1198-1199 (D.N.M. 2002).

To avoid this situation, certainty in the law is crucial. Only by resolving this issue now, will States be spared the inevitable burden of prolonged debate and repeated litigation that will result from the split between the Circuits. Accordingly, it is essential that this Court grant the petition to review the Second Circuit's ruling in this case and clarify this vitally important area of the law without further delay.

CONCLUSION

For all of the foregoing reasons, the Amici States respectfully request that this Court grant the petitions for writ of certiorari with regard to question 1 of the petitions in order to clarify whether, and under what circumstances, campaign expenditure limitations are constitutional.

Respectfully submitted,

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